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Supreme Court of the United States

OCTOBER TERM, A.D. 1902

No. 244

HORACE B. DUNBAR . . . . . Plaintiff in Error

v.

LOTTIE E. DUNBAR . . . . . Defendant in Error

BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR

JOHN OSCAR TEELE
FRANK H. STEWART
Attorneys for Plaintiff in Error

Supreme Court of the United States

OCTOBER TERM, 1902.

HORACE B. DUNBAR . . . . . Plaintiff in Error.

v.

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BRIEF FOR DEFENDANT IN ERROR.

STATEMENT OF THE CASE.

The only federal questions open in this Court are those raised by the assignment of errors (Rec., pp. 8, 9). Upon the issues of collusion and consideration the judgment of the Superior Court of Massachusetts was final and conclusive: hence the report of all the evidence (Rec., pp. 16–49) has no purpose, except as it may throw light on the character of the claims upon which the original action was brought.

The open questions are whether the said Superior Court erred in its judgment: —

FIRST, that the original defendant's discharge in bankruptcy was not a complete bar to the original plaintiff's claim in her own behalf; and, SECOND, that said discharge was not a bar to her claim for the support and maintenance of her (their) minor child, Willie W. Dunbar.

Both claims arose on the agreement declared on (Rec., pp. 3–5).

BRIEF OF THE ARGUMENT.

Points and Authorities.

I.

As to the claim of the original plaintiff in her own behalf.

a. The schedules filed in bankruptcy by the plaintiff in error set out the claims in suit as "alimony due" and "alimony" to become due (Rec., p. 58). Moreover, they were treated as alimony by the parties in their agreement (Rec., pp. 44, 45); in the correspondence (Rec., pp. 46–49); and in the power of attorney (Rec., p. 45).

It is, therefore, submitted for the defendant in error that, upon the whole record, the agreement declared on was intended by the parties as an adjustment out of Court of her claims for alimony, to avoid making it a part of the decree in the divorce suit. Whether it was a collusive proceeding is not now an open question; but it is submitted that this Court should treat the claims as having the character the parties intended them to have, and which they gave them.

Alimony has never been considered a debt provable in bankruptcy in this country, but simply a duty, and as such is not barred by the discharge.

Audubon v. *Schufeldt*, 181 U. S. 575.
Lynde v. *Lynde* (1901), 181 U. S. 183.
Barber v. *Barber* (1858), 21 How. 582.
In re Lachemeyer, Fed. Cases, 7966.
In re Garrett, Fed. Cases, 5252.
In re Baker, 96 Fed. 955.
In re Sheppard, 97 Fed. 187.
In re Anderson, 97 Fed. 321.
In re Hubbard, 98 Fed. 710.

These cases were exhaustively reviewed and the rule ap-

proved in *Re* Nowell, 99 Fed. 931, which was cited with approval by this Court in *Audubon* v. *Schufeldt, ubi supra.*

b. But we submit it is not necessary in this case to consider whether the wife's claims are strictly alimony, or even in the nature of alimony, in order to determine whether the State Court erred. The judgment complained of was rendered upon the ground that they were contingent claims, and so not provable under the Bankrupt Act of 1898.

Dunbar v. *Dunbar*, 180 Mass. 170.

The wife's claim in her own direct behalf was contingent (*a*) upon her death, and (*b*) upon her remarriage. The obligation is a continuing liability; and new breaches give new causes of action, which are not provable under the proceedings in bankruptcy.

Austin v. *Moore*, 7 Met. (Mass.) 116.
Shute v. *Taylor*, 5 Met. (Mass.) 67.
Waldo v. *Fobes*, 1 Mass. 10.

As the Act makes no provision for the proof of claims depending upon a contingency which does not happen before the time of the adjudication of the bankruptcy, this claim could not be proven at all unless as an unliquidated one.

In re Big Meadows Gas Co., 113 Fed. 974.

But liquidation was impossible.

Unlike all other bankruptcy laws, in this country and in England, the Act of 1898 does not deal specifically with contingent claims.

In re Ells, 98 Fed. 967, 968.

Debts "absolutely owing" (30 Stat. L. 563) do not include contingent claims, whether they are capable of liquidation or not. Liquidation apart from contingencies is simple enough

when life or actuaries tables can be availed of. But how will the Court liquidate a wife's claim limited upon the contingency of her remarriage? For what per cent. is interest to be rebated to find present value or "present worth"? Will the Court undertake to hazard a guess as to the probabilities in the case of an attractive woman of thirty or in the case of an ugly woman of sixty? As long as there are no means of removing the uncertainty by calculation, such claim is not provable.

Ex parte Pollard, 2 Lowell, 411.
Riggin v. *Magwire*, 15 Wall. 549.

Under the English statutes of bankruptcy down to 1869 such contingent claims were held not to be provable, and so not barred.

Millen v. *Whittenbury*, 1 Camp. 428.
Overseers of St. Martin's v. *Warren*, 1 B. & Ald. 491.
Mills v. *Auriol*, 1 H. Bl. 433.
Mudge v. *Rowan*, 3 Law Rep. Ch. Div. 85.

The English Act of 1869, however, enlarged the language of claims provable, so as to make "every kind of a debt or liability provable in bankruptcy except demands in the nature of unliquidated damages arising otherwise than by reason of a contract or promise," and that whether the liability is "capable of being ascertained by fixed rules, or assessed only by a jury, or as a matter of opinion."

Ex parte Blakemore, 5 Ch. Div. 372.
Ex parte Neal, *Re* Batey, 14 Law Rep. Ch. Div. 579 (1880).

Under that statute claims of this nature were held to be provable, and so barred; but these cases are not of authority in this country, since the English Bankrupt Law "permitted the proof of contingent debts . . . to an extent outside the

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utmost possibility of the construction of the present bankrupt act of the United States."

In re Nowell, 99 Fed. 931, 933.

See also: *In re* Ells, 98 Fed. 967.
In re Arnstein, 101 Fed. 706.
In re Mahler, 105 Fed. 428.
In re Jefferson, 93 Fed. 948.
In re Garlington, 115 Fed. 999.
Morgan v. *Wordell*, 178 Mass. 350.
Godding v. *Roscenthal* 180 Mass. 43.
Ex parte Lake, 2 Lowell, 544.

The only reference in the Act of 1898 to contingent claims, even by construction, other than that of the surety of a bankrupt (Sect. 57i) is contained in Section 63b. This paragraph, however, does not in any way enlarge the class of debts which may be proved, but provides that, if any claim coming within the scope of Section 63 is unliquidated, it may be liquidated and proved.

30 Stat. L. 563.
Lowell on Bankruptcy, p. 487.
In re Hirschman, 104 Fed. 69.
In re Yates, 114 Fed. 365.
In re Marcus, 104 Fed. 331.

If it be conceded that in this case the damages were liquidated by the parties, it was for common law purposes, and does not reach that different and independent liquidation which the law of bankruptcy provides for the purposes of proof. Such statute liquidation is remedial, and it is useless to say that in the statute sense these claims were liquidated, and so provable; for, being contingent, they were not provable at all. They were unliquidated in that sense; but it is immaterial, for the element of contingency was fatal to their proof, whether liquidated by the parties or not, and whether or not

they were otherwise subject to liquidation under the statute for purposes of proof. The contingency was of such a nature that it could not be valued for the purposes of proof under any bankrupt law existing or known to the history of the law, except perhaps the English Act of 1869, and even under that Act alimony was not provable.

Kerr v. *Kerr*, 2 Q. B. 439.
Hawkins v. *Hawkins*, 1 Q. B. 25.
Linton v. *Linton*, 15 Q. B. D. 239.

II.

As to the original plaintiff's claim for support and maintenance of their minor child.

The claim was payable directly to her, and was so specified in the contract. Much that has been said above as to her claim for her personal benefit applies with equal force to this branch of the claims sued on, which the Superior Court and the Supreme Judicial Court in their final judgment treated as a contingent claim, and so not within the language of the Act of 1898 as to provable claims.

But there is another and independent ground on which this claim should be supported, even if it was not a part of the alimony stipulated for. There is no reason in equity or good conscience why a covenant voluntarily entered into for the support of a minor child should not be held good as against bankruptcy; for the liability is a continuing one, and the consideration — to wit, the natural and common law obligation — is constant, and is not *determined* by the bankruptcy, as in most other cases. If this claim cannot be treated as alimony, it should not be held barred; for it was grounded upon a natural and legal obligation continuing after the bankruptcy proceedings, and was peculiar only in that the amount of the liability was fixed in advance. The relations between parent

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and child, and the parent's liabilities, must be worked out independently of all bankruptcy laws.

Millen v. *Whittenbury*, 1 Camp. 428.
In re Baker, 96 Fed. 954.
In re Hubbard, 98 Fed. 710.
In re Cotton, Fed. Cases, 3269.
In re Garrett, Fed. Cases, 5252.
In re Lachemeyer, Fed. Cases, 7966.

"The bankruptcy act was passed to relieve persons bringing themselves within its provisions from the incubus of hopeless indebtedness; but it was not intended to, nor does it, subvert the higher rule, which casts upon a parent the care and maintenance of his offspring. The welfare of the State, as also of every principle of law, statutory, natural, and divine, demand that, so long as he has any substance at all, he shall apply it to the maintenance of his children. Creditors, as well as all citizens, are interested in the enforcement of this rule."

Kohlsaat, D. J., *in re* Hubbard, 98 Fed. 710.

Whether or not in this case the force of the obligation to support the child after the decree of divorce, the mother having the custody, continued as to her or as to the rest of the world, it is not now material to inquire; for the father recognized and revived this obligation by his express covenant after the decree.

It is respectfully submitted that the judgment of the Superior Court of the Commonwealth of Massachusetts ought to be affirmed.

JOHN OSCAR TEELE,
FRANK H. STEWART,

Attorneys for Defendant in Error.